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(Vienna, 25-29 September 2006)

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I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the "Commission") entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law", A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) (A/CN.9/568). At that session, it decided to proceed at its future sessions with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

2. At its seventh to ninth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, and New York, 24-28 April 2006, respectively) (A/CN.9/575, A/CN.9/590 and A/CN.9/595), the Working Group considered the topics related to: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 of the Model Law and referring to the publication of forthcoming procurement opportunities; and (c) electronic reverse auctions, including whether they should be treated as an optional phase in other procurement methods or a stand-alone method, criteria for their use, types of procurement to be covered, and their procedural aspects. At its seventh and eighth sessions, the Working Group in addition considered the issues of abnormally low tenders, including their early identification in the procurement process and the prevention of negative consequences of such tenders. At its ninth session, the Working Group came to preliminary agreement on the draft revisions to the Model Law and the Guide that would be necessary to accommodate the use of electronic communications and technologies (including electronic reverse auctions) in the Model Law. It decided that at its tenth session it would proceed with further consideration of those draft revisions as well as with the in-depth consideration of the proposed revisions to the Model Law and the Guide addressing the remaining aspects of electronic reverse auctions and the investigation of abnormally low tenders, and, time permitting, would take up the topics of framework agreements and suppliers' lists (A/CN.9/595, para. 9).

3. At its thirty-eighth and thirty-ninth sessions, in 2005 and 2006, respectively, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, para. 172, and A/61/17, para. 191). At its thirty-ninth session, the Commission also recommended that the Working Group, in updating the Model Law and the Guide, should take into account issues of conflicts of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law (A/61/17, para. 192).

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its tenth session in Vienna from 25 to 29 September 2006. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Belarus, Brazil, Cameroon, Canada, Chile, China, Croatia, Czech Republic, France, Germany, Iran (Islamic Republic of), Italy, Kenya, Lithuania, Mexico, Nigeria, Pakistan, Republic of Korea, Russian Federation, Singapore, Spain, Sweden, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Bulgaria, Democratic Republic of the Congo, Dominican Republic, Finland, Indonesia, Ireland, Latvia, Malaysia, Philippines, Romania, Slovakia and Timor-Leste.

6. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: United Nations Office of Legal Affairs and the World Bank.

(b) *Intergovernmental organizations*: Asian Clearing Union (ACU), European Commission, European Space Agency (ESA), Inter-American Development Bank (IADB), and Organization for Economic Cooperation and Development (OECD).

(c) *International non-governmental organizations invited by the Working Group*: Centre for International Legal Studies (CILS), European Law Students Association (ELSA), International Bar Association (IBA), and International Chamber of Commerce (ICC).

7. The Working Group elected the following officers:

Chairman: Mr. Stephen R. KARANGIZI (Uganda)

Rapporteur: Sra. Ligia GONZÁLEZ LOZANO (Mexico)

8. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.46 and Corr.1);

(b) A note concerning electronic reverse auctions and abnormally low tenders (A/CN.9/WG.I/WP.43 and Add.1);

(c) A comparative study of framework agreements (A/CN.9/WG.I/WP.44 and Add.1);

(d) A note concerning suppliers' lists (A/CN.9/WG.I/WP.45 and Add.1);

(e) A note concerning the use of electronic communications in the procurement process and the electronic publication of procurement-related information, including drafting materials (A/CN.9/WG.I/WP.47);

(f) A further note concerning electronic reverse auctions, including drafting materials (A/CN.9/WG.I/WP.48); and

(g) A note on legislative work of international organizations relating to public procurement (A/CN.9/598/Add.1).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.
5. Other business.
6. Adoption of the report of the Working Group.

III. Deliberations and decisions

10. At its tenth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law. The Working Group used the notes by the Secretariat referred to in paragraph 8 above (WP.43 and 44 and their addenda, 47 and 48, and document A/CN.9/598/Add.1) as a basis for its deliberations. The Working Group agreed to defer the consideration of document A/CN.9/WG.I/WP.45 and Add.1 to a future session.

11. The Working Group requested the Secretariat to revise the drafting materials reflecting the deliberations at the tenth session, for its consideration at its next session. It also requested the Secretariat to prepare drafting materials for the Model Law and the Guide on the use of framework agreements. The Working Group agreed to add the issue of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

A. General comments

1. Project timetable

12. The Working Group recalled the list of topics for its consideration in revising the Model Law, as follows: (a) electronic publication of procurement-related information; (b) the use of electronic communications in the procurement process; (c) controls over the use of electronic communications in the procurement process; (d) electronic reverse auctions (ERAs) and abnormally low tenders (ALTs); (e) the use of suppliers' lists; (f) framework agreements; (g) procurement of services; (h) evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies; (i) remedies and enforcement; (j) alternative methods of procurement; (k) community participation in procurement; (l) simplification and standardization of the Model Law; (m) legalization of

documents; and (n) conflicts of interest in the procurement process, a topic that the Commission referred to the Working Group to ensure that the Model Law complied with the requirements of the United Nations Convention against Corruption[1] in this regard (see para. 3 above and para. 85 below).

13. The Working Group expressed its desire to complete its work on those topics in 2008. In seeking to achieve that target, the Working Group noted that its first priority would be the preparation of the revised text of the Model Law itself.

2. Revisions to the Guide to Enactment

14. The Working Group noted that the Guide to Enactment could be addressed not just to legislators, but also to regulators and perhaps operators (procurement officials such as contracting officers and those in charge of designing electronic systems for use in procurement). Therefore, its guidance could contain provisions addressed to each group of users, including guiding principles for legislators, regulatory guidance and practical guidance. However, noting the target date for completion of its work (see para. 13 above), the Working Group noted that it might not be possible to complete all aspects of the guidance by 2008. The Working Group therefore requested the Secretariat to undertake consultations with experts and to draft the Guide to Enactment in the following order of priority: first, following completion of the relevant sections of the Model Law text, guidance for legislators in enacting its text; secondly, guidance for regulators, and, thirdly, perhaps, guidance for other users. At its final session before the revised Model Law text was presented to the Commission, the Working Group would consider the Model Law text and the guidance to legislators and regulators completed to date. The Secretariat would subsequently be entrusted with drafting any remaining aspects of the Guide for consideration by the Working Group.

B. The use of electronic communications in procurement (A/CN.9/WG.I/X/CRP.2 and A/CN.9/WG.I/WP.47)

1. Communications in procurement: new articles 5 bis and 9/5 ter

15. The Working Group considered the wording of the draft articles 5 bis and 9/5 ter as contained in document A/CN.9/WG.I/X/CRP.2, presented to the Working Group for its consideration in addition to the wording of the draft articles proposed in paragraph 3 of A/CN.9/WG.I/WP.47.

16. The general view was that the wording of draft article 5 bis in document A/CN.9/WG.I/X/CRP.2 was an improvement on the previous formulation, as it dealt with the issue of the use of communications in the procurement process in a way that was technologically neutral and addressed functional equivalence among various means of communications. It was suggested that some refinement to make the provisions as precise as possible could be considered, so as to avoid the risk that they could be interpreted differently in different jurisdictions. Furthermore, insufficient precision could inadvertently give rise to the risk of review actions. It was also suggested that the provisions should be drafted in such a way so as to ensure that they addressed all aspects of procurement under the Model Law, and not only communications generated during a particular procurement. An example of an

aspect of procurement that could otherwise be excluded in some jurisdictions would be review procedures.

17. The Working Group considered whether the provisions in draft articles 5 bis and 9/5 ter should be consolidated in one article. The prevailing view was that they should be so consolidated because they both addressed the topic of communications in the procurement process.

18. The consideration of draft articles 5 bis and 9/5 ter then proceeded on the basis of a consolidated article, as follows:

"Article 5 bis. Communications during the procurement process

(1) Subject to the requirements set out in article [cross reference], the procuring entity shall select:

(a) The means by which documents, notifications, decisions and other information in the procurement proceedings are to be communicated by or to the procuring entity or any administrative authority involved in the procurement, or a supplier or contractor or to the public; and

(b) The means by which any requirement under this Law for information to be in writing or for a signature is to be satisfied.

(2) The means of communication of information selected, and of any requirements for writing and signatures being satisfied, must be readily capable of being used with those in common use among suppliers or contractors of the goods, services or construction being the subject matter of the procurement. Such means are to be specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings.

(3) The provisions of paragraph 1 of this article shall apply equally to the creation of the record of the procurement proceedings, and holding meetings of suppliers or contractors.

(4) The procurement regulations shall establish measures to ensure the authenticity, integrity and confidentiality of documents, notifications, decisions and other communications or information.

(5) Subject to other provisions of this Law, documents, notifications, decisions and other information to be communicated by or to the procuring entity or any administrative authority involved in the procurement or a supplier or contractor shall be in a form that provides a record of information contained therein and shall be accessible so as to be usable for subsequent reference.

(6) Communication of information between suppliers or contractors and the procuring entity referred to in articles [7 (4) and (6), 12 (3), 31 (2)(a), 32 (1)(d), 34 (1), 36 (1), 37 (3), 44 (b) to (f) and 47 (1), to update for revisions to Model Law] may be made by means that do not provide a record of the information contained therein provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that provides a record of the information contained therein and is accessible so as to be usable for subsequent reference."

19. The following drafting suggestions were made with respect to draft article 5 bis (1): (i) to use the word "specify" instead of "select" in the opening sentence and in subparagraph (2); (ii) to update the cross-references between means and form of communications following the consolidation of the draft article; (iii) as any requirement for information to be in writing or for a signature could be found in other laws, the procuring entity itself might not be in a position to stipulate how the requirements would be satisfied. Accordingly, the text could state either that the procuring entity should set out the requirements in the solicitation documents, referring where necessary to existing laws that governed the questions, or the words "unless regulated by other law" could be inserted in the beginning of subparagraph (b).

20. Regarding draft article 5 bis (2), it was suggested that the word "potential" be added to qualify "suppliers or contractors", so as to make it clear that the provisions addressed suppliers at large. However, it was also recalled that article 2 of the Model Law defined "supplier or contractor" as including potential suppliers and contractors, according to the circumstances. The Working Group requested the Secretariat to consider whether the suggested addition would be necessary in this context, and also to consider whether the drafting of the proviso could be improved.

21. Regarding draft article 5 bis (3), it was agreed that the items referred to should be expanded to include other aspects of the procurement process that would be subject to the same requirements.

22. The Working Group considered the interrelationship between the provisions facilitating the use of electronic commerce already adopted (provisions that may be similar to the UNCITRAL Model Law on Electronic Commerce,[2] for example) and the provisions adopted for the purposes of public procurement. It was noted that other branches of law, such as contract law and the law of electronic commerce, might regulate these issues in some jurisdictions, but that other issues arising in the procurement context might not be covered elsewhere. It was suggested that the paragraph be redrafted in the passive, providing that appropriate measures of authenticity, integrity and confidentiality should be provided for, but should be flexible so that to respect the particular circumstances in each enacting State. The Working Group's attention was drawn to the fact that this paragraph would provide for requirements applicable both to electronic and paper communications, introducing explicit requirements for the former.

23. The point was made that in drafting article 5 bis and any provisions for the Guide to Enactment on confidentiality, trade or other information that should be kept confidential (as required in article 45 of the Model Law, for example) should be distinguished from information that should be made public.

24. It was recalled that the reference to "accessibility" had been deleted from draft article 5 bis (4), as the focus of the paragraph should be on measures needed to ensure security of communication and information in procurement. Accessibility, it was said, aimed at another objective, namely non-discrimination, and should be dealt with elsewhere, or as a separate element of draft article 5 bis (4).

25. The question arose as to whether the Model Law would contain sufficient safeguards against discrimination in communication if article 9 (3) of the Model Law were replaced by the proposed article 5 bis (2). The positive phraseology of draft article 5 bis (2), it was said, was aimed at ensuring competition, rather than

non-discrimination. However, the Working Group noted that the provisions of article 9 (3) could be inconsistent with giving the procuring entity the right to specify the means of communication in the procurement process. The Working Group recalled its consideration of this subject at its ninth session (A/CN.9/595, paras. 23-38), and in particular the reference to the preamble of the Model Law, which provided for the fair and equitable treatment of all suppliers and contractors. Recalling its wish for the Guide to Enactment to elaborate on the notion of non-discrimination, the Working Group decided to continue the approach of addressing the question in the Guide rather than reinserting article 9 (3).

26. It was also agreed that the title of the consolidated draft article, which would address both the means and form of communications in procurement, should be changed to "Communications in procurement" so as to convey the general scope of the article.

2. Electronic submission of tenders: revision to article 30 (5)

27. The Working Group considered the alternative proposals for article 30 (5) contained in paragraph 2 of document A/CN.9/WG.I/X/CRP.2, and in paragraph 21 of document A/CN.9/WG.I/WP.47. The Working Group was of the view that consideration of the revisions to article 30 (5) should proceed on the basis of the text in document A/CN.9/WG.I/X/CRP.2.

28. The following drafting suggestions were made to the proposed text of article 30 (5), which were accepted by the Working Group: (i) to merge the opening sentence in paragraph (a) with subparagraph (i); (ii) to split subparagraph (ii) into two parts, one dealing with submission of tenders in paper and the other with submission of tenders in any other form; (iii) to replace the word "protection" in subparagraph (ii) with the words "integrity and confidentiality", so as to ensure consistency between articles 5 bis (4) and 30 (5)(d); (iv) to delete the word "security" in paragraph (d); and (v) to replace the words "the time of its submission" with either "the time of its receipt", or with "the time as determined by the procuring entity but in no case later than the time of its receipt". The latter formulation was preferred, such that the entire provision would read: "(d) the procuring entity shall preserve the integrity and confidentiality of a tender from the time as determined by the procuring entity, but in no case later than the time of its receipt, and shall ensure that the content of the tender is examined only after its opening in accordance with this Law". The formulation was considered to provide sufficient flexibility in cases where responsibility for protection of tenders was assumed by the procuring entity earlier than the moment of receipt of tenders, so as to allow (for example) for the encryption and decryption of electronic tenders by a procuring entity rather than suppliers.

29. Doubts were expressed as regards the desirability of removing the concept of "security" from the proposed article 30 (5)(d). It was noted that the concept of "security" was different from (though related to) the concepts of integrity and confidentiality. The importance of preserving security in both the paper-based and electronic environments was stressed. The Working Group's understanding was that sufficient safeguards were already provided in draft articles 30 (5) and 5 bis, as amended, to ensure adequate security in the procurement process as a whole and in the submission of tenders in particular.

30. The point was made that the Guide should provide assistance to enacting States as regards these issues. It was noted that separate treatment of submission and receipt of tenders in the paper and electronic environments might be justifiable, so as to avoid imposing more stringent requirements appropriate in the electronic environment on the paper-based environment, where they might not be necessary. It was also noted that imposing excessive requirements might discourage the use of electronic submission of tenders.

3. Electronic opening of tenders: revisions to new article 33 (4) (A/CN.9/WG.I/WP.47, paragraph 29)

31. The Working Group agreed to make the proposed text of new article 33 (4) technologically neutral by deleting references to "electronic", "electronically", and "optical" means of procurement and communication. It was also agreed that the words "capable of following [the opening of the tenders]" would be replaced with the words "fully apprised of" to convey the meaning that suppliers or contractors should be allowed not only to observe the opening process but also make comments instantaneously.

32. The Working Group decided that proposed paragraph 4 as amended would be merged with paragraph 2 of article 33, so that the latter would read as follows:

> "(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders. Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they are fully apprised of the opening of the tenders contemporaneously through the means of communication used by the procuring entity."

4. Electronic publication of procurement-related information (A/CN.9/WG.I/WP.47, paragraphs 30-37)

Article 5

33. The Working Group agreed that article 5 would be split into two paragraphs as suggested in paragraph 31 of document A/CN.9/WG.I/WP.47. Significant important judicial decisions and administrative rulings would be required to be published, but with a requirement "to update [the information] on a regular basis if need be", but there would be no requirement to "systematically maintain" that information.

Publication of information on forthcoming procurement opportunities

34. The Working Group noted developments at international and regional levels towards encouraging the publication of information on forthcoming procurement opportunities through regulation, in particular by providing incentives for such publication, such as allowing a shorter time period in the procurement process. Strong support was expressed for the inclusion of provisions on the publication of information on forthcoming procurement opportunities in the Model Law as, it was said, that practice encouraged procurement planning, led to better discipline in procurement (for example, reducing instances of splitting procurements to avoid the application of more stringent rules) and benefited suppliers and contractors (by allowing them to identify needs, plan the allocation of necessary resources and take other preparatory actions for the participation in forthcoming procurements).

35. Caution was expressed, however, as the benefits of such publication were not clearly established, and as the information could change (suppliers or contractors thereby incurring unnecessary costs having relied on it). The Model Law, it was said, should encourage best practice and should recognize that making available abundant irrelevant or misleading information (as opposed to useful and relevant information) might compromise the objectives of the Model Law, including transparency. On the other hand, it was noted that, in some jurisdictions, the publication of such information might already be required or necessary as part of the planning process.

36. The Working Group agreed that enabling provisions on publication of information on forthcoming procurement opportunities should be included in the Model Law, based on the wording in paragraph 33 of document A/CN.9/WG.I/WP.47. The text would be permissive, using the words "procuring entities may publish". The Working Group considered that the word "may" required support to make the provision effective. In this regard, it was agreed that the Guide should refer to incentives that enacting States might provide for procuring entities to publish that type of information, and to any existing regulations and practices. The Working Group noted that the Guide should stress that suppliers or contractors would not be entitled to any remedy if the procurement were cancelled following its pre-advertisement. At the same time, the Guide should draw appropriate balance between the benefits and concerns that publication of that information might raise.

C. Draft provisions to enable the use of electronic reverse auctions in the Model Law (A/CN.9/WG.I/WP.48, A/CN.9/WG.I/WP.43, paragraphs 54-66, A/CN.9/WG.I/WP.43/Add.1, paragraphs 1-6, and A/CN.9/WG.I/WP.40, paragraph 27)

1. Location of the provisions on ERAs

37. The Working Group considered the structure of the Model Law as a whole, noting that the conditions for use and procedures to be applied in particular procurement methods appeared in different chapters of the Model Law. Noting that it might wish to consider altering that structure at a future time, the Working Group agreed on a preliminary basis to include provisions stipulating the conditions for the use of ERAs to chapter II of the Model Law (which listed methods of procurement and their conditions for use). Provisions on procedural matters of ERAs, it was agreed, would be included elsewhere, such as in chapter V of the Model Law (which described procedures for alternative methods of procurement). This location, it was observed, would also allow the use of ERAs in various procurement methods, such as tendering or request for quotations, or as a stand-alone method.

38. However, the Working Group noted that a final decision on the structure of the Model Law would be taken after new procurement techniques, such as ERAs and framework agreements, had been considered. It was also recognized that the current preference for tendering contained in article 18 of the Model Law might be revisited, so as to take account of evolving procurement techniques and tools.

39. The view was expressed that in any event the Model Law would have to impose requirements according to which a procuring entity would choose the procurement method most appropriate for given circumstances. It was also pointed

out that the conditions for use of each procurement method would have to become more precise, especially in the light of the preliminary agreement in the Working Group that the selection of the method of procurement would no longer be exempted from the review under article 52 of the Model Law (A/CN.9/568, para. 112).

2. Conditions for the use of electronic reverse auctions: new article [36 bis] (A/CN.9/WG.I/WP.48, paragraphs 3-17)

Article [36 bis]

40. The Working Group considered the text of draft article 36 bis contained in paragraph 3 of document A/CN.9/WG.I/WP.48. It recalled that all provisions in article 36 bis had to be taken as a package in order to preserve safeguards against improper use of ERAs (A/CN.9/595, para. 96).

41. The following drafting suggestions were made, which were accepted by the Working Group: (i) to put references and provisions related to construction or services in square brackets throughout the text as an indication to enacting States that these types of procurement could be excluded from the scope of the article; and (ii) to delete the reference to "commonly used goods, construction or services" throughout the text and instead use consistently the reference to goods, construction or services that were generally available on the market.

42. The need for subparagraph (a) was questioned in the light of subparagraph (c) since the compliance with the conditions of the latter, it was said, led to the compliance with the requirements of subparagraph (a).

43. As regards subparagraph (d), views varied as to whether both options in the text should be retained, or whether only one should appear in the Model Law (with the Guide to Enactment referring to the other as a possible alternative). It was commented that neither approach would be desirable, if it resulted in conflicting provisions appearing in the Model Law and the Guide.

44. It was noted that the question raised which award criteria should be permitted in procurements through ERAs—price only, or price and other criteria. The view was expressed that to ensure the acceptability of the revised Model Law, its provisions should be drafted in a sufficiently flexible way allowing both price and non-price criteria in determining the successful bid. However, recalling that the primary understanding that ERAs were most suitable for procurements where the price was the only award criterion, it was also commented that the more permissive language of the second option might allow the introduction of non-price criteria in inappropriate circumstances.

45. After discussion, it was decided to retain both options in the Model Law, with the procurement regulations governing which option would be appropriate in the circumstances in any enacting State (to be reflected in the introduction to subparagraph (d)). The second option would be amended to read as follows: "Where the successful tender is to be determined on the basis of the price and other criteria that can be transformed into monetary units and can be evaluated automatically."

46. It was the Working Group's understanding that the Guide would explain in detail the options for enacting States as regards both alternatives under the prevailing circumstances on the ground, including the level of experience with ERAs in any given jurisdiction, whether any services or construction procurement

could be handled through ERAs, and taking into account the sectors of the economy. In addition, the Guide should alert enacting States that ERAs might be prone to elevated risks of corrupt practices through outsourcing decision-making beyond government, such as to third-party software and service providers. The Working Group also noted that provision should be made to ensure that any criteria to be used in determining the successful bid and the evaluation process would be disclosed to suppliers and contractors in the solicitation documents. Further, it was stressed that care would be required to ensure that subjectivity in ERAs was not introduced (such as through a points system), and that simplicity and transparency in the process should be preserved.

Guide to Enactment text

47. The suggestion was made that, in addition to the points listed in paragraph 11 of document A/CN.9/WG.I/WP.48 as requiring a detailed commentary in the Guide, the Guide should stress that procuring entities should be aware of the opportunity costs arising from the use of ERAs (costs such as those flowing should vendors abandon the government market if required to bid through ERAs).

3. Procedures in the pre-auction phase: new article [47 bis] (A/CN.9/WG.I/WP.48, paragraphs 18-27)

48. The Working Group had before it the text of draft article 47 bis, contained in paragraph 18 of document A/CN.9/WG.I/WP.48. The Working Group proceeded with the consideration of the article on the understanding that it would subsequently be merged with article 47 ter (see paras. 57-63 below).

49. The understanding of the Working Group was that provisions on pre-auction procedures had to be revised to ensure consistency with article 36 bis. Some delegates in particular preferred that two different versions of an article dealing with pre-auction procedures be prepared as per the two alternative versions of paragraph (d) of article 36 bis previously agreed (see paras. 40-46 above).

50. The Working Group also agreed that the Model Law should not prevent appropriate use of ERAs as a procurement tool in procurement methods other than tendering, such as request for quotations, as well as in any other procurement techniques that may be envisaged by the revised Model Law, such as framework agreements and dynamic purchasing systems.

51. Independently of the issue of the assessment of the qualification of the suppliers and responsiveness of tenders, the Working Group noted that two types of ERAs should be envisaged: first, a simpler version with price or other modifiable elements that can be transformed to monetary units as the only award criteria; and, secondly, a more complex version, in which non-modifiable elements of the tender would be subject to a prior evaluation. The variable elements that could be expressed as monetary units would subsequently be submitted to the auction.

52. The following drafting suggestions were made, which were referred to the Secretariat for consideration in the preparation of a revised article: (i) with reference to paragraph (1), to set out, for those procurement methods that could appropriately include ERAs, which of the normal requirements for each such procurement method would apply to the ERAs to be conducted (for example, it was noted that article 34 (4) (c), setting out procedures for the evaluation and comparison of

tenders, was not applicable to ERAs); (ii) to permit both the simpler and more complex ERAs set out above; (iii) to redraft the article in a way that would make it clear which pre-auction procedures were involved in the simpler and more complex ERAs; (iv) to reflect that the rules of the conduct of ERAs, the criteria for evaluation of tenders and any formula or other mechanism for automatic re-evaluation of tenders should be disclosed to suppliers or contractors in the beginning of the procurement process; (v) in paragraph (3), to replace the reference to article 34 (3) with a reference to article 34 (2) that dealt with the determination of tenders' responsiveness if references to tendering proceedings were to be retained; (vi) in the context of more complex ERAs, to state that invitations to participate in the auction (following pre-auction assessment(s)) were to be issued to the "bidders that had met mandatory criteria" or to the "bidders that had been chosen" rather than to all those whose tenders had been rejected as a result of those assessments; (vii) to reorder the sequence of the paragraphs to set out procedures common to both ERAs first; and (viii) to make the withdrawal of ERAs mandatory if in the opinion of the procuring entity the number of suppliers or contractors was insufficient to ensure effective competition at any time before the opening (rather than closure) of the auction (although it was noted that that approach was too prescriptive compared with a more flexible approach taken in some jurisdictions).

53. The Working Group considered proposed alternative wording of article 47 bis, which read as follows:

"Article [47 bis]. Conduct of electronic reverse auctions in the pre-auction period

(1) [The provisions of chapter III of this Law shall apply to procurement by means of electronic reverse auctions except to the extent that those provisions are derogated from in this article.]

(2) The procuring entity may require either prequalification or, in addition, submission and assessment of initial tenders.

(3) If the prequalification is required, the procuring entity shall prequalify suppliers or contractors in accordance with article 7 (5) and (6).

(4) If the submission of initial tenders is required, the procuring entity shall carry out an initial assessment of the tenders to determine their responsiveness in accordance with article 34 (2).

(5) The procuring entity shall send an invitation to participate in the auction to all suppliers or contractors except for those who have not been prequalified, or whose tenders have been rejected in accordance with article 34 (3).

(6) The invitation to participate in the auction shall set out the manner and deadline by which suppliers and contractors shall register to participate in the auction. Unless already provided to suppliers or contractors, the invitation to participate in the auction shall include all information necessary to enable the supplier or contractor to participate in the auction.

(7) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction is sufficient to secure effective competition. If the number of suppliers or contractors at any time before the opening of the auction, is in the opinion of the procuring entity insufficient to

ensure effective competition, the procuring entity shall withdraw the electronic reverse auction.

(8) If the successful tender shall be determined on the basis of not only price but price and criteria transformed into monetary units in accordance with article 36 bis [second (d)] [(e)], the procuring entity shall assess those elements of tenders that are not to be presented in the auction in accordance with such criteria and in accordance with the formula specified in the solicitation documents for the transformation of such elements into monetary units."

54. In introducing the draft article, the point was made that the article applied only for the pre-auction phase; in the auction phase, elements other than price and the elements referred to in paragraph (8) of the draft article, if applicable, could be factored in to determine the winning tender. With reference to paragraph (8) of the draft article, it was also pointed out, that its scope had been narrowed in accordance with draft article 36 bis (d), second alternative.

55. The view was expressed that the drafting should allow for the inevitable evolution of ERAs so as to avoid the provisions becoming obsolete. Thus any ERA should be permitted, subject to a number of safeguards, including: (i) transparency through inter alia disclosure early in the procurement process, either in specifications or invitations to pre-qualify or invitation to participate in the auction, all information to suppliers that would allow them to determine how tenders would be evaluated and their ranking in the evaluation process vis-à-vis other participants; and (ii) objectivity through inter alia requiring the finality of the auction stage in determining the successful tender so as to prevent any post-auction evaluation.

56. The Secretariat was requested carefully to consider which of the items listed in paragraph 60 of document A/CN.9/WG.I/WP.43 might need to be retained in the revised provisions. The point was also made that in drafting the provisions either for the Model Law or the Guide no impression should be given that ERAs, even if all criteria for their use under article 36 bis had been met, were necessarily the only or a desirable tool to be used. The Secretariat was requested to consult with experts having practical experience with the ERAs to ascertain that whatever was drafted for the Model Law and the Guide concerning ERAs was workable in practice. Certain parts of the Guide that might require specific review by experts, such as those on ERAs, could be presented separately.

4. Procedures in the auction phase: new article [47 ter] (A/CN.9/WG.I/WP.40, paragraph 27, and A/CN.9/WG.I/WP.43, paragraphs 54-58)

57. The Working Group had before it the text of draft article 47 ter, contained in paragraph 27 of document A/CN.9/WG.I/WP.40 as amended by the text in paragraph 55 of document A/CN.9/WG.I/WP.43. The Working Group proceeded with the consideration of the draft article recalling that it would subsequently be merged with article 47 bis (see para. 48 above).

58. It was noted that the article had been drafted to address ERAs in which the successful supplier would be chosen on the basis of price criteria alone. In the light of its decisions regarding article 36 bis (see paras. 40-46 above), the Working Group considered that the text should be expanded to address both the simple and more complex ERAs, and that other parameters decided during the Working Group's

consideration of articles 36 bis and 47 bis (such as those designed to ensure objectivity and transparency in the use of ERAs) would apply equally, mutatis mutandis, to article 47 ter.

59. It was noted that, further to the Working Group's understanding that ERAs could be used as a procurement tool in different procurement methods and techniques, the provisions in the draft that referred only to procedures conducted in accordance with the provisions of chapter III (tendering proceedings) in paragraphs (3), (6) and (7) would be revised.

60. The question of the anonymity of the bidders during the ERA itself was discussed. The Working Group agreed that the preservation of this anonymity during the auction phase was critical. Views differed, however, as to whether that anonymity should be preserved after closure of the auction. The predominant view was that the identity of the successful supplier and the winning price should be disclosed, as they would be in any other procurement under the Model Law, inter alia so as to permit a review of the procurement if necessary, but that the Working Group would consider at a future session whether to include provisions regarding anonymity after closure of the auction.

61. The following comments were made on the text of the draft article: (i) in paragraph 1 (b), the words "lowest price submitted" should be replaced with the words "result of the auction according to the pre-disclosed formula"; (ii) in paragraph (2), the phrase "dates and times" should be replaced with "date and time"; (iii) in paragraph 3, the phrase "[may also at any time announce the number of participants in the auction but]" and the words "[during the auction]" should be deleted, and the Working Group would revisit at a future session the issue as to whether the references to articles 33 (2) and (3) should be replaced with the language that would reflect more clearly the use of ERAs; (iv) paragraph (3) bis should be placed in square brackets, pending the determination of the Working Group as to whether to retain the provision and, if so, what its contents should be so as to capture only those events that would justify the suspension or termination of an ERA; (v) in paragraph (5), the words "or ranked first according to the pre-disclosed formula" should be inserted after the words "lowest price"; and (vi) in paragraph (6), the provision be revised to provide that if the successful supplier did not enter into a procurement contract, the procuring entity would not be in a position to select another bid and instead might hold another ERA or adopt another procurement method.

62. The Working Group decided to base its future deliberations on the following text:

"Article 47 ter. Conduct of electronic reverse auctions during the auction itself

(1) During an electronic reverse auction:

(a) There shall be automatic evaluation of all bids;

(b) Procuring entities must instantaneously communicate [the result] of the auction according to the pre-disclosed formula to all bidders on a continuous basis during the auction;

(c) All participating suppliers and contractors shall have an equal and continuous opportunity to revise their tenders in respect of those features presented through the auction process.

(2) The auction shall be closed in accordance with the precise method, date and time specified in the solicitation documents or in the invitation to participate in the auction.

(3) The procuring entity shall not disclose the identity of any bidder [until the auction has closed]. [Articles 33 (2) and (3) shall not apply to a procedure involving an electronic reverse auction].

[(3) bis The procuring entity may suspend or terminate the electronic reverse auction in the case of system or communications failures.]

(4) There shall be no communication between the procuring entity and suppliers or contractors during the electronic reverse auction other than as provided for in paragraphs 1 (b) and (c) above.

(5) The successful bid shall be the bid with the lowest price or ranked first according to the pre-disclosed formula at the time the auction closes.

(6) If the supplier or contractor submitting the successful bid in a procedure involving an electronic reverse auction is requested to demonstrate again its qualifications in accordance with [article 34 (6)] but fails to do so, if the supplier or contractor fails to sign a written procurement contract when required to do so, and/or fails to provide any required security for the performance of the contract, the procuring entity may not select another bid but may conduct another electronic reverse auction, which shall then be conducted in accordance with the provisions of this article, or adopt another method of procurement.

(7) Where appropriate, [any reference to a tender in the Model Law] the reference to a tender in articles [list relevant articles] shall be read to include a reference to an initial tender submitted in a procedure involving an electronic reverse auction."

63. In the light of the different conditions for use and procedures that could arise in the use of the simpler and more complex ERAs, and the use of price and non-price criteria, the Working Group requested the Secretariat to consider the preparation of one composite draft for articles 47 bis and ter, to address all ERAs, or to separate the text into two alternatives, to reflect simpler and more complex ERAs. It was noted that if the Secretariat included the text in paragraph 57 of A/CN.9/WG.I/WP.43 addressing non-price criteria in the revisions to be considered at the next session, the word "current" should be deleted, and that the Working Group would consider at its next session whether the reference to "the result" of the ERA in paragraph (1) (b) of the draft article above should be to "the ranking" of the suppliers.

5. Other revisions to the text of the Model Law and the Guide to Enactment to enable the use of electronic reverse auctions (A/CN.9/WG.I/WP.43, paragraphs 59-66, and A/CN.9/WG.I/WP.43/Add.1, paragraphs 1-6)

General comment

64. It was the Working Group's understanding that ERAs could be used in other procurement methods as well as tendering proceedings.

Record of procurement proceedings (article 11) (A/CN.9/WG.I/WP.43, paragraph 59) and modification and withdrawal of tenders (article 31) (A/CN.9/WG.I/WP.43, paragraphs 65-66)

65. The Working Group agreed to revisit the question of how to refer to the use of ERAs in the record, and how and when offers in the context of ERAs could be modified and withdrawn, at a future session.

Contents of solicitation documents (article 27) (A/CN.9/WG.I/WP.43, paragraphs 60-64)

66. The Working Group considered the provisions in paragraph 60 of document A/CN.9/WG.I/WP.43.

67. The following drafting suggestions were made: (i) to start the introduction to paragraph (n) bis with the phrase "in addition to the provisions in article 27"; (ii) in paragraph (n) bis (ii), to replace the reference to the "website address" with "address" or "website or other electronic address"; (iii) to replace the current (n) bis (iii) with "the rules for the conduct of the electronic reverse auction"; (iv) to expand paragraph (n) bis (iv) by referring in addition to the formula that would be used in the evaluation of criteria during the auction (noting that the suggested wording in paragraph 64 of document A/CN.9/WG.I/WP.43 would be amended to comply with articles 36 bis and 47 bis and ter and merged with paragraph (n) bis (iv)); (v) to reinstate, with the opening phrase stating "unless set out in the rules for the conduct of the electronic reverse auction", the provisions of paragraph (n) bis (v), those provisions of paragraph (n) bis (vi) that referred to stages in ERAs and those provisions of paragraph (n) bis (vii) that referred to conditions under which bidders would bid (in particular the reference to increments); and (vi) to amend paragraph (n) bis (ix) to read as follows "all other information concerning the electronic reverse auction necessary to enable the supplier or contractor to participate in the auction". The Working Group confirmed its understanding that the remaining issues of paragraph (n) bis would be addressed in the Guide.

68. The Working Group's understanding was that the Model Law should list only those requirements for the content of the solicitation documents in procurements conducted by way of ERAs that were crucial for the proper handling of ERAs and for the fair and equitable treatment of all suppliers and contractors. The rules of ERAs, which would be included in the solicitation documents, would list any additional requirements, including any technical requirements for a particular ERA. (Recommendations and guidance on those requirements should be discussed in the Guide).

Tender securities (article 32) (A/CN.9/WG.I/WP.43/Add.1, paragraphs 1 to 4)

69. The Working Group noted that tender securities were not often used in ERAs. Views differed as to whether the Guide should discourage requiring tender securities in the context of ERAs, or whether a more flexible approach would be desirable (in that requiring a tender security could serve as a disincentive to withdraw the bid before the opening of the auction).

Examination, evaluation and comparison of tenders (article 34) (A/CN.9/WG.I/WP.43/Add.1, paragraphs 5 to 6)

70. The Working Group considered the provisions in paragraph 5 of document A/CN.9/WG.I/WP.43/Add.1.

71. The Working Group agreed that the following wording would be considered at a future session: "No change in a matter of substance in the initial tender, including changes in price, shall be sought, offered or permitted, except during the auction itself". That wording would make it sure, it was said, that changes to tenders in ERAs were permitted only during the auction phase itself, and would avoid giving the impression that during the auction phase changes could be made to make unresponsive tenders responsive.

D. Abnormally low tenders (A/CN.9/WG.I/WP.43/Add.1, paragraphs 7 to 13)

1. Proposed additions to article 34 of the Model Law

72. The Working Group considered the provisions in paragraph 8 of document A/CN.9/WG.I/WP.43/Add.1.

73. The following drafting suggestions were made: (i) to refer to "concerns as to the capacity of the tenderer(s) to perform the contract" throughout the text; and (ii) to amend paragraph 4 (a) bis (ii) to read as follows: "[t]he procuring entity has taken account of the information supplied, if any, but continues, on a reasonable basis, to hold those concerns".

74. The Working Group's understanding was that the supplier's refusal to provide information requested by the procuring entity should not give an automatic right to the procuring entity to reject the tender on the basis that it was abnormally low. The Working Group deferred its decision on whether any decision regarding abnormally low tenders by the procuring entity should be open to review. The Working Group noted that domestic regulation of that issue might vary significantly. It was suggested that the Working Group might revert to that point when it considered review provisions.

75. The Secretariat was requested to propose the appropriate location for the provisions, taking into account that the issue should not be limited to tendering proceedings, and that risks of ALTs should be examined and addressed by the procuring entity at any stage of the procurement, including through qualification of suppliers.

2. Proposed additions to the Guide to Enactment text addressing article 34

76. It was agreed that the Guide should discuss the issues raised in paragraph 8 of document A/CN.9/WG.I/WP.43/Add.1, other issues considered by the Working Group at its eighth session (A/CN.9/590, paras. 107-109) as well as issues discussed in a note by the Secretariat A/CN.9/WG.I/WP.36 (in particular danger of rejecting tenders applying "arithmetical methods", and the cost-effectiveness and cost implications for SMEs of performance bonds and independent guarantees). The Working Group agreed that the Guide should highlight the importance of adequate examination of tenders for their responsiveness and supplier for their solvency, of precise and detailed specifications and of objective criteria, for identifying and rejecting ALTs.

77. As regards the text for the Guide in paragraph 13 of document A/CN.9/WG.I/WP.43/Add.1, the Secretariat was requested to: (i) consider the order in which the elements of guidance should be presented; (ii) reconsider the reference to "a normal level of profit" in paragraph (1) bis as that criterion might be subjective and possibly irrelevant in defining ALTs; and (iii) provide examples of ALTs rather than defining the concept.

78. With reference to paragraph (1) quater contained in paragraph 13 of document A/CN.9/WG.I/WP.43/Add.1, views varied on whether the Guide should contain more flexible wording regarding information that may be requested by procuring entities about the cost structure of tenders. The prevailing view was that procuring entities should be alerted that it might be inappropriate to request that type of information from suppliers, but that there would be no prohibition on doing so. The Secretariat was requested, in redrafting the provisions for the Guide, to take into account differences in regulation of the subject in various jurisdictions (for example, in some instances, contracting officials were barred from demanding information relating to cost structure, because of risks that such information could be misused).

E. Framework agreements (A/CN.9/WG.I/WP.44 and Add.1)

79. Some delegates and observers updated information in documents A/CN.9/WG.I/WP.44 and Add.1 in the light of the most recent developments in the use and regulation of framework agreement in their respective jurisdictions.

80. The Working Group noted that two major issues would primarily affect the preparation of any drafting materials on the subject: first, whether specifications could be altered within the operation of the framework agreements, and second, whether suppliers not parties to the original framework agreement could join it after the conclusion of the master contract. The view was expressed that the response to these questions would depend on the complexity and subject-matter of framework arrangements. It was suggested that the Model Law provisions should be drafted sufficiently broadly to accommodate any type of framework agreements.

81. The Working Group, recognizing the wide-spread use of framework agreements and noting positive experience with their use in some jurisdictions (and trends towards their express regulation), entrusted the Secretariat with the preparation of drafting materials for the Model Law and the Guide that would set out conditions for the use of framework agreements and provide necessary

safeguards against commonly encountered problems in their use, such as risks of collusion among suppliers, corruption and anti-competitiveness.

V. Other business

82. The Working Group had before it a note by the Secretariat on legislative work of international organizations relating to public procurement (A/CN.9/598/Add.1) (see paras. 8 and 10 above). The Working Group took note of the recommendation by the Commission that the Working Group, in updating the Model Law and the Guide, should take into account the issue of conflicts of interest and should consider whether any specific provisions addressing that issue would be warranted in the Model Law (see para. 3 above).

83. In that context, the Working Group noted the provisions on conflicts of interest contained in the e-tendering and electronic reverse auctions requirements and guidelines of the multilateral development banks (the "MDBs") for MDB financed procurement (A/CN.9/598/Add.1, paras. 15 and 17),[3] and in article 9 of the United Nations Convention against Corruption (A/CN.9/598/Add.1, paras. 43-45). As regards the latter, the Working Group noted that article 9 (1)(e) of the Convention required taking, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements, which had no equivalent in the Model Law.

84. The Working Group also heard a report from the Secretariat on its participation at the coordination meeting of the MDBs (Rome, 19-20 September 2006) that discussed, inter alia a study being undertaken by the MDBs on the issues of corruption and technology in public procurement, in which conflicts of interest in the context of electronic procurement would be specifically addressed.

85. The Working Group agreed to add the issue of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide.

86. The Working Group also heard reports on current legislative and other related activities in the procurement field, from regional and international organizations and authorities and confirmed that its work in revising the Model Law should be undertaken in close cooperation with those organizations and authorities.

Notes

[1] General Assembly resolution 58/4, annex.

[2] For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I (also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL website (http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm).

[3] Section 12 of the E-Tendering Requirements and section 11 of the E-reverse Auction Guidelines, both available at http://www.mdb-egp.org.